

## BARGAINING IN THE AGE OF HEALTH CARE AND PENSION REFORM

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### I. HEALTH INSURANCE - IDENTIFYING THE ISSUES AND PREPARING FOR BARGAINING

#### A. Health Care Costs

1. The issue of employee health care is one of the most important topics of contract negotiations. Employers want to control health care costs and Unions want to maintain current benefit levels—especially where wage increases are nominal or non-existent. Additionally, as employers negotiate multi-year contracts in 2014 and 2015, the Cadillac Tax under the ACA must be considered.
2. Significant preparation is necessary to evaluate your health care plan, available options, and to formulate meaningful contract proposals. Items to review in this regard include:
  - a. What does your current health care plan look like?
    - i. What do employees pay and what does the Employer pay toward premiums? Is this the same for all levels or tiers of coverage? This will be an important calculation for purposes of the Cadillac Tax.
    - ii. What are the deductibles?
    - iii. What are the co-pays? (especially Rx)
    - iv. How does your plan compare to other employers and/or the market in general?
  - b. How many employees participate in the plan? How many insureds are covered?
    - i. Do most employees have single coverage?
    - ii. What is the breakdown of participants among the coverage tiers?
  - c. When is the last time you made changes to the plan, and what were those changes?
  - d. What would changing certain elements of the plan do to overall plan costs?
    - i. Focus on deductibles and co-pays as that is where the most savings typically are generated.

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- ii. Have broker prepare alternative plans with projected premium costs for each.
- iii. Consider whether a high deductible plan with an HSA (Health Savings Account) or HRA (Health Reimbursement Account) is possible.
- iv. Consider whether creation of a Healthcare Reimbursement Plan (HRP) is possible. Under an HRP, an employer cancels its group plan and determines the amount to provide to employees for reimbursement of approved health insurance premiums.

NOTE: Significant considerations associated with HRP's are addressed later in this outline.

- e. What are the historical trends with respect to overall health plan costs at your workplace? (Be specific)

## **II. HEALTH INSURANCE - AT THE TABLE**

### **A. The Costs of Employer Provided Health Insurance**

- 1. Health insurance remains the single most costly benefit offered by Employers to their employees. The status of employee health care as the most costly benefit component will only grow in significance, particularly as the Cadillac Tax under the ACA begins in 2018.
  - a. Assessing the proportionate costs of health insurance as a part of the employee's total compensation package.
    - i. As a part of institutional planning, an Employer must assess its ability to maintain its current level of health insurance benefits and its current contributions to employee single and dependent health care coverage. This consideration must be made in terms of viewing employee health care costs as a part of an employee's total compensation package.
    - ii. Absent health insurance cost containment provisions and limitations in the collective bargaining agreement, the Employer cannot properly plan with respect to employee compensation as the continued trend of health insurance cost inflation will subject the institution to unpredictable additional costs.
- 2. The Impact of Health Insurance Costs on the Labor Negotiations Process
  - a. Increased labor strife as a result of tightening economic times combined with increasing health insurance costs.

- b. Considering the Union's view of the health care insurance crisis:
    - i. Unions generally do not view health insurance as a compensation item. Rather, Unions tend to view health insurance as a separate entitlement, similar to the entitlement of a grievance process or a just cause progressive discipline process. This viewpoint dictates the Union's strategy in either asserting health care proposals or responding to management cost-containment proposals.
    - ii. Unions are generally resistant to any perceived "give back" of previously negotiated health insurance benefits.
3. Strategies for Gaining Labor Union Cooperation in Implementing Cost-Saving Measures and Alternatives
- a. Traditional Group Plans
    - i. Employers should consider a variety of cost-containment options, including the following:
      - (a) Impose a maximum dollar limitation on Employer contribution toward single and/or dependent coverage. This option is preferable to a percentage contribution requirement. In a percentage plan, the Employer cannot reliably predict the possible increases.
      - (b) Cost sharing formula: This option generally involves the Employer's agreement to pay a fixed percentage of the current health insurance premium costs, and often includes an agreement to share the burden of any cost increases (i.e., the Employer and employee will contribute on an equal basis towards the cost of any health insurance premium increases).
      - (c) Modified insurance plan benefits provisions (such as increased deductible payments or prescription co-pay amounts) which reduce the overall cost of a health plan.
    - ii. Recommended Approach: Combination of maximum Employer dollar contribution, cost sharing arrangement for premium increases, and modified insurance plan benefits provisions.
  - b. Alternatives to the Traditional Group Plan:
    - i. Explore establishing Health Savings Account program with High Deductible Health Plan.

- (a) HSA distributions are tax-free for qualified medical expenses.
  - (b) Helps significantly reduce insurance premiums.
- ii. Explore establishing Health Reimbursement Account (HRA) program paired with a High Deductible Health Plan.
- iii. Healthcare Reimbursement Plan (HRP). The ACA and its regulatory guidance present challenges in connection with HRP's. Before implementing an HRP, an employer should consult with an attorney to review the risks associated with such plans.
  - (a) Employer cancels its group plan.
  - (b) Employer provides a subsidy to employees to reimburse them for approved health insurance premium expenses.

CAUTION: The employer reimbursement must be processed on an after-tax basis. If done on a pre-tax basis, the employer will be regarded as having established a non-compliant group health plan with significant taxes and penalties.
  - (c) Employees purchase their own coverage through private carriers or the exchange.
  - (d) Employees are reimbursed for premium costs up to the amount allocated by the employer.
  - (e) Employees may also qualify for health insurance tax credits under the ACA if they purchase through the exchange and qualify based on low income status.
  - (f) LIABILITY: Creation of an HRP requires careful consideration and evaluation of potential ACA penalties for failing to provide Minimum Essential Coverage (\$2,000 times the total number of full-time employees minus 30 employees). The cost of this penalty along with the reimbursement costs must be considered when comparing the HRP to the employer's group plan costs. Additionally, the amounts reimbursed to employees will be taxable income, requiring payment of additional employer payroll taxes.
  - (g) CREDITABLE EARNINGS: Reimbursements paid to employees under an HRP could qualify as

creditable earnings and count toward 6% salary limitations.

- iv. Collective risk pools (health benefit cooperatives):
  - (a) The use of health care coalitions or associations to allow a number of institutions to bring down health care costs by increasing the size of the risk pool – and correspondingly achieving a better diversity of risk;
  - (b) The risks of joining a health care association or coalition and contract considerations; and
  - (c) Consider the bargaining obligations.

c. Cash in lieu of insurance options: consider increasing employee percentage contribution toward premiums and putting value of cash-in-lieu of insurance option on salaries.

- i. Example: Employer has a \$3,000 cash option for forgoing all insurance and a \$2,100 cash option for foregoing family coverage. Employees who take single coverage must pay 10% of premium.

Option: Add \$3,000 to all salaries and increase insurance contribution rates for single coverage to 25%. Net effect on employees' take home pay may be zero, but over time program will increase employees' incentives to control premium cost increases.

#### 4. Contract Language Tips:

- a. Avoid language that may lock Employer into higher rates.
  - i. Health insurance for retirees remaining on employer's plan (i.e., even if they pay the entire premium!)  
  
NOTE: IMRF employees are permitted by law to elect to remain on the employer's group plan following retirement.
  - ii. Maintenance of benefits clauses - do not want any restrictions on Employer's ability to negotiate with provider over modifications to health benefit plans in order to maintain affordability (i.e., coverage, co-pays, deductibles.)
- b. Avoid language that obligates Employer to pay employees' entire portion of their health insurance premium.

- i. Want employees to pay a portion of their premium so they recognize the value of this important employer sponsored benefit.
- ii. Want employees to pay a portion so they have a vested interest in the affordability of the plan or plans.
- c. Fixed dollar contributions by the Employer are preferred over a contribution that represents a percentage of the premium.
  - i. May address future premium increases through various cost sharing formulas.
- d. Avoid language that may restrict Employer's ability to make mid-term changes to health insurance.
  - i. Seek language that would allow the Employer to make certain changes to health insurance with mid-term bargaining with the Union.

**B. Strategies and Options for Addressing Potential Liability Under the ACA**

1. Offering Minimum Essential Coverage (MEC) to Substantially All Full-time Employees and Their Dependents
  - a. Employers who fail to offer MEC to substantially all full-time employees and their children up to age 26 risk liability for potential penalties equal to an annual amount of \$2,000 times the total number of full-time employees less 30. (NOTE: Transition relief for 2015 calculates penalty based on less 80 full-time employees).
  - b. Consider offering a group health plan to all full-time employees and their children up to age 26, even if the coverage is not affordable or does not meet minimum value standards.
    - i. This option avoids the risk of a incurring a penalty of \$2,000 times the number of the employer's full-time employees (less 30 employees) even if employees must pay 100% of the premium, or the plan does not meet minimum value standards.
    - ii. The employer may still be liable for a penalty of \$3,000 for each employee who does not have access to affordable and minimum value coverage, but only if the employee obtains coverage through a health exchange and meets the low income requirements to receive a tax credit or subsidy.
2. Offering Affordable Coverage

- a. To avoid the penalties for unaffordable coverage, only the lowest cost plan that provides minimum value must be considered. The plan must be affordable for employee only coverage. It need not be affordable for dependents to avoid the penalty.
  - b. Consider offering a minimum value plan that costs no more than 9.5% of any full-time employee's monthly rate of pay for self only coverage. This plan can be added to other plan options that are currently offered.
    - Monthly rate of pay = hourly rate x 130 – OR – annual salary divided by 12.
  - c. Consider implementing a flexible credit or flexible spending plan where employees are permitted to use the entire amount of the flex benefit toward their portion of a health insurance premium, in addition to other options.
3. Offering a Minimum Value Plan
    - a. Employer contributions to an employee's Health Savings Account ("HSA") or certain types of Health Reimbursement Arrangements ("HRAs") may be included in the computation of minimum value offered by the employer's health plan.
    - b. Consider offering or enhancing contributions to an employee's HSA or HRA account to increase the value offered under the plan as measured for ACA purposes.
  4. Consider language that would allow the employer to make changes to the health insurance plan (e.g., deductibles, co-pays, etc.) or to offer additional plans during the term of the agreement in order to comply with the requirements of the ACA or to avoid penalties or taxes under the ACA.
  5. Cadillac Tax- Effective January 1, 2018
    - a. Forty percent (40%) excise tax on employer sponsored "Cadillac Plans" defined as health plans with premium cost that exceeds specified limits.
    - b. The premium cost limit currently set for 2018 is \$10,200 for self-only coverage and \$27,500 for other than self-only coverage (employer plus one, family, etc). This amount may be adjusted for 2018 if the actual increase in the cost of health care exceeds 55% from the time of passage of the ACA in 2010 and implementation of the tax in 2018 ("the health cost adjustment percentage"). Annual cost of living adjustments may be made thereafter based on the CPI.

- c. Explore ways to reduce plan costs to avoid/minimize tax implications (See, part V.A.3 of outline).
- d. Consider language to allow adjustments during the agreement to ensure ACA compliance. This can be done through specific language that grants the Employer the right during the term of the agreement to modify the plan or introduce new plans in order to comply with the ACA and to avoid any taxes or penalties. Alternatively, the contract may contain a re-opener clause that would grant to the Employer the right to conduct mid-term negotiations over changes to the health insurance plan.

### III. PENSION REFORM

#### A. Overview

- 1. Law was supposed to be effective June 1, 2014. Five lawsuits were filed challenging the constitutionality of the law, and all five cases were consolidated in Sangamon County. The court stayed implementation of the law in May 2014.
- 2. In November 2014, the law was declared unconstitutional in its entirety by the Sangamon County Circuit Court. The case is currently on direct appeal to the Illinois Supreme Court and oral arguments are scheduled for March 2015.

**NOTE:** The Supreme Court decided in *Kanerva v. Weems*, 2014 IL 115811 (2014), that the Pension Protection clause of the Illinois Constitution extended to post-retirement health benefits. This decision is a signal to how the court will interpret the Pension Protection Clause in the pension reform litigation.

- 3. Certain provisions are not severable from the Act, meaning they must be considered by the court as one piece.
  - a. COLA calculation and COLA skipping;
  - b. Employee contributions and employer funding (e.g. the 1% reduction);
  - c. 10% Pension savings and pension stabilization fund;
  - d. New defined contribution plan;
  - e. New defined contribution plan related provisions in the Retirement Systems Reciprocal Act.
- 4. All other provisions are severable, including:
  - a. Retirement age delays;

- b. Maximum pensionable earnings cap;
  - c. Effective rate of interest;
  - d. Unused vacation/sick leave;
5. This means that if the law is declared unconstitutional, the court must strike all of the provisions referenced in subpart 3 above, including the new COLA calculation method and skipping, as well as the 1% decrease in the member contribution. However, the court could find that some or all of the provisions referenced in subpart 4 above are valid and these could remain in effect.

#### **B. PENSION PROPOSAL**

1. Though details are still forthcoming, it has been reported that the Governor's proposed plan includes:
  - a. Freeze Tier 1 participants at current benefits earned and move them to Tier 2 going forward. Or, allow Tier I participants a "buy out" of earned benefit and move to 401(k) style plan.
  - b. Move toward 401(k) style defined contribution plan.
  - c. Penalize school districts granting end of career salary spikes:
    - Any increase greater than rate of inflation.

#### **IV. WHAT'S NEXT?**

##### **A. US. SUPREME COURT CASE CHALLENGING AFFORDABLE CARE ACT**

1. In *King v. Burwell*, the plaintiffs are challenging the legality of the ACA's tax credit subsidies designed to assist eligible middle to low income individuals in paying for coverage obtained in states relying on the federal health insurance marketplace (currently 34 states).
2. **Oral arguments occurred on March 4, 2015 and a ruling is anticipated in June 2015.**

##### **B. AFFORDABLE CARE ACT**

1. The current case before the U.S. Supreme Court attacks the subsidies provided under the law. These subsidies are viewed as critical to the law's effective implementation as they allow many millions of people to afford insurance they may not otherwise be able to obtain.
2. Primary impact of a ruling against subsidies will be in states that do not run their own exchange and instead rely on the federal healthcare marketplace (34 states, including Illinois).

3. States could implement their own exchange and restore the subsidy. Illinois runs an exchange in partnership with the federal government and is reported to perform some key functions, thus making it more viable for the state to implement its own exchange (*Source: New York Times, The Health Care Supreme Court Case: Who Would Be Affected?, March 4, 2015*)

### **C. PENSION REFORM**

1. The anticipated court ruling against the previously enacted pension reform law will redirect focus to the Governor's proposal and legislative initiatives.
2. Is there the potential for compromise? Other states and cities have achieved reductions in pension liabilities.
  - Detroit: By filing for bankruptcy, the City successfully argued that it was allowed to reduce pension benefits for retirees, freeze benefits for current participants, and shift employees to a new plan—despite a constitutional provision protecting vested pension benefits.
  - Stockton, CA: Also in bankruptcy, the court found that the city was entitled to freeze pension benefits.
  - New Jersey: The state is negotiating with the NJEA to map out a plan to freeze pensions in an effort to avoid a system collapse.